# Kesatuan Kebangsaan Pekerja-Pekerja Bank v Yang Berhormat Menteri Sumber Manusia & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–299 OF 2008
AZIAH ALI J
31 JANUARY 2011

*Administrative Law — Remedies — Judicial review — Application for — Certiorari and mandamus — Recognition of trade union — First respondent's finding that applicant had not obtained recognition from second respondent — No trade dispute to be referred for adjudication — Whether first respondent acted outside his jurisdiction and/or committed error of law — Whether decision tainted with illegality, irrationality and procedural impropriety — Whether court could exercise discretionary power of judicial review to quash decision — Whether applicant had locus to enter into negotiation with second respondent*

*Labour Law — Industrial dispute — Recognition of trade union — Reference to Industrial Court for adjudication — First respondent refused reference to Industrial Court — Whether first respondent acted in excess of jurisdiction and/or committed an error of law — Industrial Relations Act 1967 ss 2, 9, 18 & 26*

The applicant was a registered national trade union since 1958 representing employees from the non-clerical, clerical and senior clerical categories in the banking and financial institutions in Peninsular Malaysia. On 7 March 2001, the applicant signed a collective agreement ('CA') with the Malayan Commercial Banks' Association ('MCBA') for the period 1 January 2000 to 31 December 2002 ('the 2000–2002 CA'). At the material time, AmBank Bhd was a member of MCBA and was accordingly bound by the said agreement. On 13 December 2004, the Director General of Trade Unions ('DGTU') registered Kesatuan Pekerja-Pekerja AmFinance Bhd ('KEPPA') as an in-house union for the employees of AmFinance Bhd. KEPPA thereafter obtained recognition from AmFinance Bhd on 30 December 2004. AmFinance Bhd and AmBank Bhd were both members of the AmBank Group. Pursuant to a vesting order dated 18 May 2005, all of AmBank Bhd's business, contract, obligations and liabilities were transferred to AmFinance Bhd. On 1 June 2005, AmFinance Bhd changed its name to AmBank (M) Bhd ('the second respondent'). As a result, the employees of AmBank Bhd, including those who were in benefit of membership in the applicant, were transferred to work in the second respondent. On 2 June 2005, the second respondent signed a CA with KEPPA to which the Industrial Court gave cognisance on 12 August 2005. On 3 January 2006, KEPPA changed its name to Kesatuan Pekerja-Pekerja

AmBank (M) Bhd ('the third respondent'). On 5 June 2006, the applicant invited the second respondent to commence collective bargaining with a view to conclude a new CA for the period 1 January 2003 to 31 December 2005 ('the new CA'). The applicant's invitation was however rejected by the second respondent on the basis that the second respondent was not a party to the 2000–2002 CA and that they had already signed a CA with the third respondent. The applicant proceeded to report the dispute pertaining to the new CA with the Director General of Industrial Relations ('DGIR') as a trade dispute between the applicant and the second respondent under s 13(6) of the IRA. Conciliation failed and the applicant then requested the DGIR to notify the first respondent about the dispute in accordance with s 18(5) of the IRA and to seek reference of the dispute to the Industrial Court pursuant to s 26(2) of the IRA. The first respondent however, declined to refer the dispute to the Industrial Court in respect of the new CA. Hence, the applicant applied to quash the decision of the first respondent and further, for an order of mandamus to direct the first respondent to refer the matter to the Industrial Court for adjudication. The applicant contended that the Minister had acted outside his jurisdiction and/or had committed an error of law having decided not to exercise his discretion properly under s 26(2) of the IRA. The first respondent however, submitted that it had not erred in finding that since the applicant had not obtained recognition from the second respondent therefore the applicant had no locus to enter into negotiation with the second respondent.

**Held**, dismissing the application with costs:

(1) AmBank Bhd and the second respondent are two separate entities. The second respondent was originally known as MBf Finance Bhd. At that time, the applicant's attempt to seek recognition by MBf Finance Bhd failed. Subsequently, MBf Finance Bhd became AmFinance Bhd. On 22 December 2004, AmFinance Bhd accorded voluntary recognition to KEPPA. Thus, on the facts, the applicant's contention that the second respondent was bound by the 2000–2002 CA between the applicant and AmBank Bhd cannot be sustained as AmBank Bhd still existed. On the evidence, the second respondent was never a member of MCBA nor has it ever had a CA with the applicant or MCBA (see para 33).

(2) Recognition is a pre-requisite under s 13 of the IRA. The applicant failed to get recognition from MBf Finance Bhd, as the second respondent was previously known. There was no evidence to show that by conduct the second respondent had accorded recognition to the applicant. Hence, no recognition whatsoever had been accorded by the second respondent to the applicant. The applicant had failed to satisfy the requirements of s 13 of the IRA (see para 34).

(3) As the applicant had not been accorded recognition by the second

respondent, the applicant had no locus to invite the second respondent to enter into negotiation of a CA with the applicant. The second respondent acted within the law when it refused to enter into negotiation with the applicant. Since the applicant had not shown that it had satisfied the requirements of s 13, there was therefore no trade dispute to be referred to the Industrial Court (see para 35).

(4) It was not disputed that on 22 December 2004, the second respondent which was then known as AmFinance Bhd had voluntarily accorded recognition to KEPPA. Pursuant to the CA which had been given cognisance by the Industrial Court, the second respondent had implemented the provisions of the CA and had paid arrears. The applicant's attempt to set aside the decision of the DGTU to register KEPPA was dismissed by the courts. Having accorded recognition to KEPPA, the second respondent was therefore bound by the provisions of s 9 of the IRA and therefore could not accord recognition to the applicant (see para 36).

(5) Insofar as the 2000–2002 CA between the applicant and AmBank Bhd, there must be mutual agreement between both parties for the rights and obligations of AmBank Bhd to be taken over by the second respondent. Needless to say, the second respondent would have to give its consent. However, in the circumstances of this case there was no possibility for the second respondent to agree in view of the CA it entered with KEPPA. Article 9 of the CA between the second respondent and KEPPA provides that: 'The Company shall recognise the Union as the sole negotiating body in respect of the employees.' Thus, under the CA, there cannot be another union representing the second respondent's employees (see para 37).

**[Bahasa Malaysia summary**

Pemohon merupakan kesatuan sekerja kebangsaan berdaftar sejak tahun 1958 yang mewakili pekerja-pekerja dari kategori-kategori bukan perkeranian, perkeranian dan perkeranian kanan dalam institusi-institusi perbankan dan kewangan di Semenanjung Malaysia. Pada 7 Mac 2001, pemohon telah menandatangani perjanjian kolektif ('PK') dengan Persatuan Bank-Bank Perdagangan Tanah Melayu ('PBPTM') bagi tempoh 1 Januari 2000 hingga 31 Disember 2002 ('PK 2000–2002'). Pada masa matan, AmBank Bhd merupakan ahli PBPTM dan sewajarnya terikat dengan perjanjian tersebut. Pada 13 Disember 2004, Ketua Pengarah Persatuan Sekerja ('KPPS') telah mendaftarkan Kesatuan Pekerja-Pekerja AmFinance Bhd ('KEPPA') sebagai persatuan dalaman untuk pekerja-pekerja AmFinance Bhd. KEPPA kemudian mendapat mengiktirafan daripada AmFinance Bhd pada 30 Disember 2004. AmFinance Bhd dan AmBank Bhd adalah kedua-duanya ahli AmBank Group. Menurut perintah peletakhakan bertarikh 18 Mei 2005, semua perniagaan, kontrak, tanggungjawab dan liabiliti AmBank Bhd dipindahkan kepada

AmFinance Bhd. Pada 1 Jun 2005, AmFinance Bhd telah menukar namanya kepada AmBank (M) Bhd ('responden kedua'). Akibat itu, pekerja-pekerja AmBank Bhd, termasuklah mereka yang mendapat faedah keahlian dengan pemohon, telah dipindahkan untuk bekerja dengan responden kedua. Pada 2 Jun 2005, responden kedua telah menandatangani PK dengan KEPPA yang mana Mahkamah Perusahaan telah ambil maklum pada 12 Ogos 2005. Pada 3 Januari 2006, KEPPA telah menukar namanya kepada Kesatuan Pekerja-Pekerja AmBank (M) Bhd ('responden ketiga'). Pada 5 Jun 2006, pemohon telah menjemput responden kedua untuk memulakan tawar-menawar secara kolektif dengan tujuan menyempurnakan PK baru bagi tempoh 1 Januari 2003 hingga 31 Disember 2005 ('PK baru'). Jemputan pemohon bagaimanapun telah ditolak oleh responden kedua atas dasar bahawa responden kedua bukan pihak kepada PK 2000–2002 dan bahawa mereka telahpun menandatangani PK dengan responden ketiga. Pemohon telah terus melaporkan pertikaian berkaitan PK baru tersebut kepada Ketua Pengarah Perhubungan Perusahaan ('KPPP') sebagai pertikaian dagangan antara pemohon dan responden kedua di bawah s 13(6) Akta Perhubungan Perusahaan 1967 ('APP'). Rundingan damai telah gagal dan pemohon kemudian memohon KPPP untuk memaklumkan kepada responden pertama berhubung pertikaian tersebut menurut s 18(5) APP dan untuk merujuk pertikaian tersebut ke Mahkamah Perusahaan menurut s 26(2) APP. Responden pertama, bagaimanapun, enggan merujuk pertikaian tersebut ke Mahkamah Perusahaan berkaitan PK baru itu. Justeru itu, pemohon telah memohon untuk membatalkan keputusan responden pertama dan selanjutnya, satu perintah *mandamus* untuk mengarahkan responden pertama merujuk perkara tersebut ke Mahkamah Perusahaan untuk diadili. Pemohon berhujah bahawa Menteri telah bertindak di luar bidang kuasa beliau dan/atau telah melakukan kesilapan undang-undang setelah memutuskan untuk tidak menggunakan budi bicara beliau dengan wajar di bawah s 26(2) APP. Responden pertama bagaimanapun, berhujah bahawa ia tidak terkhilaf dalam penemuan dengan memandangkan pemohon tidak mendapat pengiktirafan daripada responden kedua maka pemohon tiada *locus standi* untuk memasuki perundingan dengan responden kedua.

**Diputuskan**, menolak permohonan dengan kos:

(1) AmBank Bhd dan responden kedua merupakan dua entiti berbeza. Responden kedua asalnya dikenali sebagai MBf Finance Bhd. Pada masa itu, percubaan pemohon untuk mendapat pengiktirafan dengan MBf Finance Bhd gagal. Berikutan itu, MBf Finance Bhd menjadi AmFinance Bhd. Pada 22 Disember 2004, AmFinance Bhd telah dengan sukarela memberikan pengiktirafan kepada KEPPA. Oleh itu, berdasarkan fakta, hujah bahawa responden kedua terikat dengan PK 2000–2002 antara pemohon dan AmBank Bhd tidak dapat dikekalkan kerana AmBank Bhd

masih wujud. Berdasarkan keterangan, responden kedua tidak pernah menjadi ahli PBPTM mahupun pernah memasuki PK dengan pemohon atau PBPTM (lihat perenggan 33).

(2) Pengiktirafan merupakan prasyarat di bawah s 13 APP. Pemohon telah gagal mendapat pengiktirafan daripada MBf Finance Bhd, sepertimana responden kedua telah dikenali sebelumnya. Tiada keterangan menunjukkan bahawa melalui perlakuan responden kedua pengiktirafan telah diberikan kepada pemohon. Justeru itu, tiada apa-apa pengiktirafan telah diberikan oleh responden kedua kepada pemohon. Pemohon telah gagal memuaskan keperluan s 13 APP (lihat perenggan 34).

(3) Oleh kerana pemohon tidak diberikan pengiktirafan oleh responden kedua, pemohon tiada *locus standi* untuk mengajak responden kedua memasuki perundingan PK dengan pemohon. Responden kedua telah bertindak menurut undang-undang apabila ia enggan memasuki rundingan dengan pemohon. Oleh kerana pemohon tidak menunjukkan bahawa ia telah memenuhi s 13, maka tiada pertikaian dagangan dirujuk ke Mahkamah Perusahaan (lihat perenggan 35).

(4) Tidak dipertikaikan bahawa pada 22 Disember 2004, responden kedua yang pada masa itu dikenali sebagai AmFinance Bhd telah secara sukarela memberikan pengiktirafan kepada KEPPA. Menurut PK yang telah diambil maklum oleh Mahkamah Perusahaan, responden kedua telah melaksanakan peruntukan-peruntukan PK dan telah membayar tunggakan. Percubaan pemohon untuk mengenepikan keputusan KPPS untuk mendaftar KEPPA telah ditolak oleh mahkamah. Setelah diberikan pengiktirafan kepada KEPPA, responden kedua dengan itu terikat oleh peruntukan s 9 APP dan oleh demikian tidak boleh memberikan pengiktirafan kepada pemohon (lihat perenggan 36).

(5) Setakat 2000–2002 PK antara pemohon dan AmBank Bhd, perlu ada perjanjian bersama antara kedua-dua pihak bagi hak dan tanggungjawab AmBank Bhd diambil alih oleh responden kedua. Begitupun, responden kedua perlu memberikan persetujuannya. Walau bagaimanapun, dalam keadaan kes ini tiada kemungkinan untuk responden kedua bersetuju berdasarkan PK yang dimasukinya dengan KEPPA. Artikel 9 PK antara responden kedua dan KEPPA memperuntukkan bahawa: 'The Company shall recognise the Union as the sole negotiating body in respect of the employees.' Oleh itu, di bawah PK tersebut, tidak boleh ada persatuan lain yang mewakili pekerja-pekerja responden kedua (lihat perenggan 37).]

**Notes**

For cases on judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 781–787.

For cases on recognition of trade union, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1800–1801.

**Cases referred to**

*Dynamic Plantations Bhd v YB Menteri Sumber Manusia & Anor* [2010] 4 MLJ 299; [2010] 2 CLJ 525, FC (refd)

*Kennesion Brothers Sdn Bhd v Construction Workers Union* [1989] 2 MLJ 419; [1989] 1 CLJ 54 (Rep); [1989] 2 CLJ 56, SC (refd)

*Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar* [2001] 3 MLJ 705; [2001] 3 CLJ 547, FC (refd)

**Legislation referred to**

Banking and Financial Institutions Act 1989 s 50

Industrial Relations Act ss 9, 9(3)(a), 11, 13, 13(1), (6), 14(2), 17(1), (1)(a), 18, 18(5), 26(2), (3)

Rules of the High Court 1980 O 53

*Alex De Silva (Bodipalar Ponnudurai De Silva) for the applicant.*

*Azlina Mahmod (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.*

*S Rutheran (The Chamber of R Sivagnanam & Associates) for the second respondent.*

*M Eswary (The Law Firm of M Eswary) for the third respondent.*

**Aziah Ali J:**

**[1]** The applicant applies for judicial review under O 53 of the Rules of the High Court 1980 for the following orders:

(a) an order of certiorari to quash the decision of the first respondent, the honourable Minister dated 5 October 2008 not to refer a purported trade dispute between the applicant and the second respondent regarding the collective agreement for the period 1 January 2003 till 31 December 2005 to the Industrial Court for adjudication; and

(b) an order of mandamus to direct the first respondent to refer the matter to the Industrial Court for adjudication and an award in respect of the dispute on the applicant's CA for the period 1 January 2003 to 31 December 2005.

BACKGROUND

**[2]** According to the applicant it is a registered national trade union since 1958 representing approximately 28,000 employees from the non-clerical, clerical and senior clerical categories in the banking and financial institutions

in Peninsular Malaysia. On 7 March 2001, the applicant signed a collective agreement Cog No 73/2001 with Malayan Commercial Banks' Association ('MCBA') which was enforceable for the period 1 January 2000 to 31 December 2002 ('the 2000–2002 CA'). The applicant says that at the material time AmBank Bhd was a member of MCBA and was accordingly bound by the said agreement.

**[3]** On 13 December 2004, the Director General of Trade Unions ('DGTU') registered Kesatuan Pekerja-Pekerja AmFinance Bhd ('KEPPA') as an in-house union for the employees of AmFinance Bhd. KEPPA thereafter obtained recognition from AmFinance Bhd on 30 December 2004. AmFinance Berhad and AmBank Bhd were both members of the AmBank Group.

**[4]** Pursuant to a vesting order dated 18 May 2005 granted by the Kuala Lumpur High Court all of AmBank Bhd's business, contract, obligations and liabilities were transferred to AmFinance Bhd.

**[5]** On 1 June 2005 AmFinance Bhd changed its name to AmBank (M) Bhd ('the second respondent'). As a result, the employees of AmBank Bhd, including those who were in benefit of membership in the applicant, were transferred to work in the second respondent.

**[6]** On 2 June 2005, the second respondent signed a CA Cog No 167/2005 with KEPPA to which the Industrial Court gave cognisance on 12 August 2005. On 3 January 2006 KEPPA changed its name to Kesatuan Pekerja-Pekerja AmBank (M) Bhd ('the third respondent').

**[7]** On 5 June 2006 the applicant by letter presented an invitation to the second respondent to commence collective bargaining with a view to conclude a new CA for the period 1 January 2003 to 31 December 2005 ('the new CA').

**[8]** The applicant's invitation was however rejected by the second respondent on 4 July 2006 on the basis that the second respondent was not a party to the 2000–2002 CA and that they had already signed a CA Cog No 167/2005 with the third respondent.

**[9]** On 2 October 2006 the applicant proceeded to report the dispute pertaining to the new CA with the Director General of Industrial Relations, Malaysia ('DGIR') as a trade dispute between the applicant and the second respondent under s 13(6) of the IRA.

**[10]** Conciliation failed and the applicant then requested the DGIR to

notify the first respondent about the dispute in accordance with s 18(5)of the IRA and to seek reference of the dispute to the Industrial Court pursuant to s 26(2) of the IRA.

**[11]** On 20 August 2008 the applicant received a letter from the DGIR dated 12 August 2008 enclosing the first respondent's decision dated 5 August 2008 not to refer the dispute in respect of the new CA to the Industrial Court.

**[12]** The applicant contends that the decision of the Minister is unreasonable and the Minister has acted outside his jurisdiction and/or has committed an error of law having decided not to exercise his discretion properly under s 26(2) of the IRA which provides as follows:

> 26 Reference of trade disputes to the Court
>
> (1) Where a trade dispute exists or is apprehended, the Minister may, if that dispute is not otherwise resolved, refer the dispute to the Court on the joint request in writing to the Minister by the trade union of workmen which is a party to the dispute or a trade union of employers which is a party to the dispute.
>
> (2) The Minister may of his own motion or upon receiving the notification of the Director General under section 18(5) refer any trade dispute to the Court if he is satisfied that it is expedient so to do:
>
> Provided that in the case of a trade dispute in any Government service or in the service of any statutory authority, reference shall not be made except with the consent of the Yang di-Pertuan Agong or State Authority as the case may require.

SUBMISSIONS

**[13]** For the applicant counsel submits that the issue of recognition of the applicant by the second respondent or the recognition of KEPPA by the second respondent which appears to be the main ground for the minister's decision is immaterial and irrelevant.

**[14]** Counsel submits that article 2 of the 2000–2002 CA provides that the 2000–2002 CA continues to be binding upon parties until it is terminated by a party to the agreement or is replaced by a new CA. AmBank Bhd was a party to the 2000–2002 CA. Before the vesting, on 25 April 2005 AmBank Bhd had by letter acknowledged and recognised the 2000–2002 CA and had requested its employees to resort to the grievance procedure under article 4 of the 2000–2002 CA regarding complaints they had.

**[15]** It is submitted that on 18 May 2005 ie the date of the vesting order, the 2000–2002 CA was still valid and binding on parties ie the second respondent since by the terms of the vesting order all of AmBank Bhd's business, contracts, rights, obligations and liabilities were transferred to AmFinance Bhd which

changed its name to the second respondent on 1 June 2005. Counsel refers to the vesting order which states as follows:

> 5 Any Contract (to the extent that it is still in force or has any effect) shall have effect as from the Scheme Date as if AmFinance had been a party thereto instead of Am Bank.
>
> 12 In respect of any right or liability of AmBank transferred to AmFinance pursuant to this Order, AmFinance shall have the same rights, powers and remedies (and in particular the same rights and powers as to taking or resisting legal proceedings or making or resisting applications to any authority) for ascertaining, protecting or enforcing that right or resisting that liability of Am Bank as if it had at all times been a right or liability of AmFinance, including those rights or liabilities in respect of any legal proceedings or applications to any authority pending immediately before the Scheme Date or against AmBank.

**[16]** It is submitted that by virtue of s 50 of the Banking and Financial Institutions Act 1989 ('BAFIA') the effect of the vesting order is that all the rights, assets and liabilities of AmBank Bhd were transferred to the second respondent. The obligations of AmBank Bhd under the 2000–2002 CA were preserved and naturally flow to the second respondent and the second respondent is still bound by the 2000–2002 CA. The second respondent therefore stands in the same position where AmBank Bhd was before the vesting. Therefore it is submitted that the recognition previously granted to the applicant by AmBank Bhd continued to subsist and was still valid and this enables the applicant to negotiate a new CA for its members now employed by the second respondent. The issue of recognition of the applicant by the second respondent does not arise and there is no issue of the recognition being withdrawn or being rendered invalid.

**[17]** Counsel submits that article 2 of the 2000–2002 CA expressly stipulates as follows:

> EFFECTIVE DATE AND DURATION
>
> This Agreement shall be deemed to have come into effect on 1st January 2000 and shall continue to remain in force until 31st December 2002 and thereafter until superseded by a new Agreement.

It is submitted that there is no evidence that either the applicant or the second respondent had terminated the 2000–2002 CA. In the absence of a termination, it is submitted that the second respondent continued to be bound and be a party to the 2000–2002 CA and the 2000–2002 CA is enforceable against the second respondent.

**[18]** Counsel submits that the minister has failed to take into account s 17(1)(a) of the IRA which provides as follows:

17 Effect of collective agreement

(1) A collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on —

(a) the parties to the agreement including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and

(b) ...

It is submitted that by virtue of s 17(1) the second respondent is bound by the 2000–2002 CA and cites the case of *Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar* [2001] 3 MLJ 705; [2001] 3 CLJ 547 wherein Steve Shim CJ (Sabah & Sarawak) said:

> It is accepted that a collective agreement is one entered into between the employer and its employees or union of workmen normally for a period of three years. Under s 17(1)(b), all employees are bound whether or not they are members of the union which negotiated the collective agreement or whether they join as employees subsequent to the date of the collective agreement. This provision in the Act cuts across the law of contract and is meant for the general application of the collective agreement on all the employees of a company. In our view, the same approach must apply to s 17(1)(a) involving employers. The rationale is one of continuity of the collective agreement from the original parties and members of the union to their successors, assignees or transferees. It is meant to ensure that the rights and obligations of the parties to the collective agreement be preserved by those taking over from the original parties so as to maintain what Mohd Azmi J in *Dunlop Estate Bhd* has aptly described as 'good relationship and fair dealings between the employers and workers and their trade union and the settlement of any differences or disputes arising from their relationship'. And we may add that this is essential in promoting social justice, industrial peace and harmony in Malaysia.

**[19]** Counsel refers to the case of *Dynamic Plantations Bhd v YB Menteri Sumber Manusia & Anor* [2010] 4 MLJ 299; [2010] 2 CLJ 525 wherein the Federal Court said that despite the cessation of the appellant as members of MAPA, the collective agreement was in force by virtue of article 2 Part 1 of the collective agreement which provides for the collective agreement to run until superseded by a new collective agreement or an award of the Industrial Court. In the absence of a new collective agreement or decision of the court to vary it, the collective agreement continues to be in force and the question of the second respondent not being recognised does not arise. Therefore counsel submits that since the 2000–2002 CA was still valid and subsisting at the time the vesting order was made and at the time the third respondent signed its CA with the second respondent and recognised by the Industrial Court on 12 August 2005, the 2000–2002 CA continues to bind the second respondent. Counsel submits that the argument of the respondents that the applicant had never obtained

recognition unlike the third respondent and as such is not entitled to invite the second respondent to negotiate a new CA is untenable and must fail.

**[20]** Counsel submits that the 2000–2002 CA ought to prevail over the CA signed between the second respondent and the third respondent. It is further submitted that there is no reason why two CAs cannot be in force at the same time within the second respondent's institution. The new CA would protect the group of employees who are members of the applicant whilst the CA between the third respondent and the second respondent is applicable to employees who are members of the third respondent. Since the two groups of employees are separate and distinct, there would be no overlap or conflict with regard to trade union rights to be enforced by the second respondent.

**[21]** It is submitted that the Minister has erred in the construction of the validity of the 2000–2002 CA that at the end of the 2000–2002 CA on 31 December 2002 the second respondent was released from its obligations therein. It is submitted that the minister has misread article 2. Counsel submits that article 2 expressly provides that the 2000–2002 CA remains in force until superseded by a new agreement. It is further submitted that the Minister has failed to appreciate the terms and legal effect of the vesting order in deciding the issue of the applicant's locus standi to negotiate a new CA. It is further submitted that the Minister has failed to consider the effect of s 50 of the BAFIA. Counsel submits that there are serious issues which can only be resolved by the Industrial Court. Therefore it is submitted that this court ought to interfere and remedy the injustice.

**[22]** Counsel for the second respondent disagrees with the contention of the applicant's counsel that the issue of recognition does not arise. It is submitted that by virtue of s 13(1) of the IRA recognition is a statutory pre-requisite for collective bargaining. Section 13(1) provides as follows:

> 13 Collective bargaining
>
> (1) Where a trade union of workmen has been accorded recognition by an employer or a trade union of employers —
>
> (a) the trade union of workmen may invite the employer or trade union of employers to commence collective bargaining; or
>
> (b) the employer or the trade union of employers may invite the trade union of workmen to commence collective bargaining.

Further the agreement between the applicant and MCBA further provides:

> ARTICLE 1 — PARTIES
>
> (1) the parties bound by this Agreement are THE MALAYAN COMMERCIAL BANKS' ASSOCIATION,... and its member BANKS which have accorded

> recognition to the Union (hereinafter referred to as 'the Bank' or 'the Banks' when collectively referred to) of the one part and the NATIONAL UNION OF BANK EMPLOYEES, STATES OF MALAYA...

Counsel submits that the applicant reported the matter to the Industrial Relations Department as a trade dispute under s 13(6) of the IRA when the applicant has never obtained recognition as required under s 13(1). This was conceded by the applicant in its memorandum of appeal in Suit No W-01–53 of 2006 when it states as follows:

> ... although recognition had not been granted and no CA was in existence...

It is submitted that in the absence of recognition the applicant has no legal basis to present a trade dispute under s 13(6) of the IRA over the refusal of the second respondent to negotiate terms of employment with it. Counsel for the third respondent similarly submits that since the applicant was never recognised by the second respondent, s 13 can never be triggered and therefore the applicant did not have the requisite standing to pursue any trade dispute arising from the failure to negotiate a CA which it had no standing to negotiate in the first place.

**[23]** In the written submissions by counsel for the third respondent is found the background that led to the existence of the second respondent. The legal entity which constitutes the second respondent was incorporated on 25 March 1969 under the name 'Malaysian Borneo Finance Corporation (M) Bhd' which changed its name to 'MBf Finance Bhd' on 19 December 1985. In 2001 the applicant attempted to seek recognition from MBf Finance Bhd but failed as a membership check by the DGTU revealed that only 43.49% of the employees of MBf Finance Bhd under the scope of the applicant's representation had become members of the applicant. Therefore MBf Finance informed the applicant that it would not accord recognition to the applicant to represent its employees under the scope of the applicant's representation.

**[24]** On 15 June 2002 there was a merger between MBf Finance Bhd and Arab-Malaysian Finance and the assets, liabilities, rights and obligations of Arab Malaysian Finance Bhd were transferred to MBf Finance Bhd which then changed its name to AmFinance Bhd. Since at that time there was no union representing the employees under the scope of representation of KEPPA, on 13 January 2004 KEPPA was formed and on 22 December 2004 AmFinance Bhd accorded voluntary recognition to KEPPA. The applicant's attempt for the court to review the decision of the DGTU to register KEPPA was dismissed by the High Court, the Court of Appeal and the Federal Court.

**[25]** Pursuant to a merger exercise, by order dated 18 May 2005 AmFinance Bhd acquired the agreed assets and liabilities of AmBank Bhd. On 1 June 2005 AmFinance Bhd changed its name and is now known as AmBank (M) Bhd (the

second respondent). It operated under a new licence issued by the Ministry of Finance and continued to carry on its banking business. AmBank Bhd still exists and has been renamed. In September 2005 AmBank Bhd changed its name to AMBB Capital Bhd. On 21 February 2006 AMBB Capital Bhd changed its name to Amlslamic Bank Bhd. Thus it is submitted that the second respondent is a separate and distinct entity from AmBank Bhd. The second respondent was never a member of MCBA nor has it ever had a CA with the applicant or MCBA.

**[26]** Counsel for the third respondent submits that by virtue of s 11 of the IRA, once a union is granted recognition no other union may present a claim for recognition for the same class of employees for a period of three years. Counsel for the second respondent refers to the case of *Kennesion Brothers Sdn Bhd v Construction Workers Union* [1989] 2 MLJ 419; [1989] 1 CLJ 54 (Rep); [1989] 2 CLJ 56; wherein the Supreme Court held as follows:

> Once the employer has accorded the recognition under s 9(3)(a) of the Industrial Relations Act, there appears to be no provision in the Act, enabling the employer to act unilaterally in withdrawing or revoking the recognition.

**[27]** Counsel for the second and third respondents submit that on the facts the case of *Dynamic Plantations Bhd v YB Menteri Sumber Manusia & Anor* cited by counsel for the applicant is distinguishable as in that case the Federal Court found that the employer had by conduct accorded recognition. The Federal Court held that recognition can also be granted by way of conduct of the parties and recognition under s 9 of the IRA is not the exclusive procedure for recognition. Counsel submits that the Federal Court did not hold that recognition is not a pre-requisite. It is submitted the facts in that case are not found in the present case for the following reasons:

(a) the second respondent was never a member of MCBA;

(b) the second respondent had never been a party to any CA with the applicant;

(c) the applicant has not obtained recognition from the second respondent;

(d) the second respondent has accorded recognition to KEPPA; and

(e) the second respondent has rejected overtures made by the applicant for collective bargaining due to its recognition of KEPPA.

**[28]** With regard to the vesting order which the applicant relies on in support of its submissions that the issue of recognition does not arise, counsel submits that the vesting order does not encompass a CA as no CA was mentioned in the Vesting Order. Further it is submitted that a CA is not a 'contract of employment'. A CA is a creature of statute and can only be entered into with a

recognised union, it must be in writing, it must be for a minimum period of three years and it must be deposited for cognisance in the Industrial Court. It is submitted that a CA cannot be novated through a simple vesting order as a CA is subject to specific provisions under the IRA governing its variations. The MCBA-NUBE agreement expressly states that it is only for 'member Banks' which have 'accorded recognition to the Union'. Thus AmBank Bhd and AmBank (M) Bhd have no legal capacity to vary the express provisions of the MCBA-NUBE Agreement which has been given cognisance by the Industrial Court and is deemed to be an award of the Industrial Court.

**[29]** In the Minister's affidavit in reply he avers that he has considered the facts presented by both the applicant and the second respondent as follows:

(a) that the applicant was dissatisfied with the decision of the second respondent in respect of the New CA;

(b) that the second respondent has accorded recognition to the third respondent KEPPA;

(c) that the applicant's application to the High Court and the Court of Appeal to quash the decision of the DGIR to register KEPPA was dismissed;

(d) the second respondent has never accorded recognition to the applicant;

(e) on 30 December 2004 the second respondent has accorded recognition to KEPPA for the period 1 January 2005 till 31 December 2007;

(f) the second respondent has entered into a CA with KEPPA and recognised KEPPA as representing employees similar to the employees claimed by the applicant;

(g) pursuant to s 11 of IRA the applicant cannot claim for recognition until the expiry of three years;

(h) the applicant has never sought recognition from the second respondent;

(i) the second respondent takes the position that the applicant has no locus standi to enter into negotiation of a CA with the second respondent; and

(j) the applicant has failed to obtain a court order to set aside the recognition accorded to KEPPA.

**[30]** The Minister denies that he has acted in excess of his jurisdiction as alleged by the applicant. The Minister avers that:

(a) the conciliation carried out under s 18 of the IRA does not involve him;

(b) the DGIR referred the dispute to him on 16 May 2008; and

(c) the letter dated 3 June 2007 was merely an advice to the applicant which the applicant was at liberty to disregard.

The Minister further avers that the CA between MCBA and the second respondent has expired on 31 December 2002. Thereafter the second respondent was no longer a member of MCBA and the applicant ought to have sought recognition from the second respondent as a new entity and not a member of MCBA before the applicant invited the second respondent to commence collective bargaining. The Minister avers that he is satisfied that the dispute between the applicant and the second respondent does not involve any serious issue of fact/law that requires adjudication.

**[31]** Learned senior federal counsel submits that s 26(3) of the IRA confers a discretion on the Minister whether or not to refer a trade dispute for adjudication. It is submitted that a trade dispute arises where an employer refuses to enter into negotiation with a union that it has accorded recognition. In the present case it is submitted that the Minister has not erred in finding that since the applicant has not obtained recognition from the second respondent therefore the applicant has no locus to enter into negotiation with the second respondent. In the absence of any recognition accorded by the second respondent to the applicant, learned senior federal counsel submits that the Minister has not erred in finding that there is no trade dispute to be referred for adjudication. Further it is submitted that in view of s 11 of the IRA, the applicant ought to wait three years before seeking recognition from the second respondent. Learned senior federal counsel submits that the decision made by the Minister in the exercise of his discretion does not suffer from any illegality, irrationality or procedural impropriety.

DECISION

**[32]** The applicant relies on the vesting order to support its submissions that the second respondent is bound by the 2000–2002 CA it entered into with AmBank Bhd. There is no dispute that the second respondent has never accorded recognition to the applicant and there is no CA between the second respondent and the applicant. However the applicant contends that recognition of the applicant by the second respondent does not arise on the ground that the applicant had been accorded recognition by AmBank Bhd.

**[33]** The facts however show that AmBank Bhd and the second respondent are two separate entities. As submitted by the third respondent's counsel, AmBank Bhd is still in existence. It became known as AMBB Capital Bhd. It is now known as Amlslamic Bank Bhd. The second respondent was originally known as MBf Finance Bhd. At that time the applicant's attempt to seek recognition by MBf Finance Bhd failed. Subsequently MBf Finance Bhd became AmFinance Bhd. On 22 December 2004 AmFinance Bhd accorded

voluntary recognition to KEPPA. Thus on the facts I find that the applicant's contention that the second respondent is bound by the 2000–2002 CA between the applicant and AmBank Bhd cannot be sustained as AmBank Bhd still exists. On the evidence I agree with the respondents that the second respondent was never a member of MCBA nor has it ever had a CA with the applicant or MCBA.

**[34]** I agree with counsel for the respondents that recognition is a pre-requisite under s 13 of the IRA. The applicant failed to get recognition from MBf Finance Bhd, as the second respondent was previously known. There is no evidence to show that by conduct the second respondent has accorded recognition to the applicant. Hence I find that no recognition whatsoever has been accorded by the second respondent to the applicant. The applicant has failed to satisfy the requirements of s 13 of the IRA which expressly provides that only a trade union which has been accorded recognition by an employer may invite the employer to commence collective bargaining as follows:

> 13 Collective bargaining
>
> (1) Where a trade union of workmen has been accorded recognition by an employer or a trade union of employers —
>
> (a) the trade union of workmen may invite the employer or trade union of employers to commence collective bargaining; or

**[35]** As the applicant has not been accorded recognition by the second respondent I agree with the respondents that the applicant had no locus to invite the second respondent to enter into negotiation of a CA with the applicant. The second respondent acted within the law when it refused to enter into negotiation with the applicant. Since the applicant has not shown that it has satisfied the requirements of s 13, there is therefore no trade dispute to be referred to the Industrial Court.

**[36]** In any event it is not disputed that on 22 December 2004 the second respondent which was then known as AmFinance Bhd had voluntarily accorded recognition to KEPPA. Pursuant to the CA which had been given cognisance by the Industrial Court, the second respondent has implemented the provisions of the CA and has paid arrears. The applicant's attempt to set aside the decision of the DGTU to register KEPPA was dismissed by the courts. Having accorded recognition to KEPPA, the second respondent is therefore bound by the provisions of s 9 of the IRA and therefore could not accord recognition to the applicant.

**[37]** I agree with the second respondent that a CA cannot be novated through a simple vesting order. As submitted by counsel for the second

respondent, a CA is subject to statutory provisions. In particular s 14(2) of the IRA provides amongst others that a CA shall prescribe the procedure for its modification and termination. Article 3 of the applicant's agreement with MCBA states as follows:

> ARTICLE 3 - MODIFICATION AND TERMINATION
>
> (1) During the period of this Agreement, neither the Association nor the Union shall seek to alter, modify, annul or add to any of its provisions in any way whatsoever, except by mutual agreement between the parties.

Therefore insofar as the 2000–2002 CA between the applicant and AmBank Bhd, there must be mutual agreement between both parties for the rights and obligations of AmBank Bhd to be taken over by the second respondent. Needless to say the second respondent would have to give its consent. However in the circumstances of this case there is no possibility for the second respondent to agree in view of the CA it entered with KEPPA.

**[38]** Counsel for the applicant submits that there is no reason why two CAs cannot be in force at the same time within the second respondent's institution. With respect I am unable to agree. Article 9 of the CA between the second respondent and KEPPA provides that 'The Company shall recognize the Union as the sole negotiating body in respect of the employees'. Thus under the CA there cannot be another union representing the second respondent's employees. For the reasons stated I find no basis for the submissions by counsel for the applicant that the 2000–2002 CA ought to override the CA between the second respondent and KEPPA.

**[39]** I find that the applicant has failed to show any valid or cogent grounds upon which this court ought to exercise its discretionary power of judicial review and to quash the decision of the Minister. For the reasons stated above I find that the Minister has not erred in his decision not to refer the dispute to the Industrial Court for adjudication. I agree with the learned senior federal counsel that the decision of the Minister does not suffer from the infirmities of illegality, irrationality or procedural impropriety. Therefore the application is dismissed with costs of RM10,000 to each respondent.

*Application dismissed with costs.*

Reported by Ashgar Ali Ali Mohamed